

**141-Doc. 51, P-2**

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FEDERAL DEFENDER PROGRAM

002

IN THE SUPERIOR COURT OF GWINNETT COUNTY  
STATE OF GEORGIA

STATE OF GEORGIA )

vs. )

No. 00-B-0700-7 )

WESLEY VANDALE HARRIS, )

Defendant. )

COPY

Transcript of proceedings in the above-referenced case, heard before the Honorable John S. Langford, Senior Judge, reported by Jeanine M. Ritter, Certified Court Reporter, at the Gwinnett Justice and Administration Center, 75 Langley Drive, Lawrenceville, Georgia, on January 14, 2002.

## APPEARANCES OF COUNSEL:

On behalf of the State: Daniel J. Porter, D.A.  
Donald P. Geary, Assistant D.A.  
John S. Melvin, Assistant D.A.

On behalf of the Defendant: Herbert Adams, Jr., Esq.  
Walt M. Britt, Esq.  
Christine A. Koehler, Esq.

On behalf of Gwinnett County  
Superior Court Judges: Kathryn L. Allen  
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Jeanine M. Ritter  
Certified Court Reporter  
Lawrenceville, Georgia 30043  
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1 Whereupon,

2 TOM LAWLER,

3 was called as a witness herein and, having been first duly  
4 sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. BRITT:

7 Q State your name for the record.

8 A Tom Lawler.

9 Q And Mr. Lawler, how are you employed?

10 A I'm the elected Clerk of Superior Court in Gwinnett  
11 County.

12 Q And when were you elected the Clerk of the Superior  
13 Court?

14 A Six years ago.

15 Q And prior to that time you were the elected  
16 district attorney here in this district for two years -- I  
17 mean two terms; is that correct?

18 A Back from '85 to about '91.

19 Q And prior to that time you had been the -- in  
20 private practice and also the solicitor or prosecutor in  
21 juvenile court for a number of years; is that correct?

22 A Correct.

23 Q And you are a member of the Bar of the State of  
24 Georgia in good standing?

25 A Yes.

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1 Q Have you, since becoming the elected Clerk of the  
2 Gwinnett Superior Courts and State Courts, ever taken an oath  
3 before the judge of the Probate Court pursuant to O.C.G.A.  
4 Section 15-12-23 that you, as the Clerk of the Superior Court  
5 and as the Clerk of the Gwinnett County Board of  
6 Commissioners, swear that you will duly discharge faithfully  
7 the duties of the Clerk of the Board of Jury Commissioners for  
8 Gwinnett County as required by law and shall never divulge any  
9 of the proceedings and deliberations of the jury commissioners  
10 unless compelled to testify thereof in some court of this  
11 state. Have you ever taken that oath?

12 A I've never taken such an oath.

13 Q Have you ever served in the capacity as clerk to  
14 the board of jury commissioners?

15 A I have not.

16 Q Would it be fair to say that after the jury list is  
17 compiled, revised and signed off by the chairman of the board  
18 of jury commissioners, you take it into your office as a file;  
19 is that correct?

20 A It is filed along with the certificate.

21 Q And that is your total involvement to this date; is  
22 that correct?

23 A Well, it depends on what you mean by involvement.  
24 I have duties as with -- with regard to --

25 Q Drawing the --

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1 A -- technology.

2 Q Right.

3 A But I don't do anything personally. I have a staff  
4 that actually does the electronic manipulations necessary to  
5 pick the pool.

6 Q Okay. You have never met with the board of jury  
7 commissioners in your capacity as clerk of the Gwinnett  
8 Superior Court or as clerk of the board of jury commissioners  
9 in the revision and compilation of the jury list that is  
10 reflected on State's Exhibit No. 1, have you?

11 A I have not.

12 Q And why is that?

13 A Well, that's because we operate under an internal  
14 operating procedure, which I have a copy of. It may already  
15 be in evidence.

16 Q Let me show you -- there's been a series of them  
17 over this period of time we're talking about that are shown on  
18 Defendant's Exhibits 2, 3 and 4?

19 A Right. Under these -- and, of course, I have the  
20 original of the first one also.

21 Q Okay.

22 A A certified copy of it, which is back in 1988 when  
23 we moved to this building. Apparently we went to a jury plan  
24 at that time. And in 1998 the original one was filed. And  
25 from that point on, the court administrator took over the

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1 duties of jury clerk.

2 Q You have reviewed the statute in question in this  
3 case and the population figures that are set forth in that; is  
4 that correct?

5 A Yes, I have.

6 Q And would it be fair to say that the population  
7 figures are 183,000 and not more than 216,000, according to  
8 the United States census for 1990 or any future census; is  
9 that correct?

10 A That's correct.

11 Q And in 1990 Gwinnett County did not fit within that  
12 census figure, and in 2000 they did not fit within that census  
13 figure; is that correct?

14 A My investigation reveals that's true.

15 Q So the jury plan as promulgated by the Gwinnett  
16 Superior Court judges is violative of the statute; is that  
17 correct?

18 MR. PORTER: Objection. Your Honor, that's what  
19 the Court is here --

20 THE COURT: Sustain the objection.

21 MR. BRITT: Okay.

22 BY MR. BRITT:

23 Q Defendant's Exhibit No. 5, is that an oath of your  
24 predecessor in office, Mr. Yates, who was the clerk of the  
25 superior court?

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1 A It appears to be an oath and it's got his  
2 signature. I'm familiar with his signature.

3 Q And you've never subscribed to a similar oath; is  
4 that correct?

5 A No. I absolutely have not done that.

6 MR. BRITT: That's all the questions I have. Oh,  
7 I'm sorry. I do have something else.

8 BY MR. BRITT:

9 Q Since these issues have been raised and I have  
10 spoken to you about these various issues, have you attempted  
11 to approach the superior court judges about curing the problem  
12 of you taking the oath?

13 A Well, when I discovered it -- and I actually  
14 discovered the fact that we may be in conflict with the  
15 statute. Prior to the -- the weekend prior to the testimony  
16 was scheduled before -- I don't remember the date.

17 Q Right, back in December.

18 A December. And upon discovery, Your Honor, of the  
19 fact that we didn't fit the population cap, I came in on that  
20 Sunday and found through the census that we were in violation  
21 since '90. I notified the district attorney because I wasn't  
22 sure that he was aware, but he was already aware that that was  
23 a possibility.

24 So the next morning I contacted our chief judge,  
25 Dawson Jackson. And we had -- only by telephone. And we had

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1 a discussion very briefly as to the situation, because it did  
2 appear that the plan may be in jeopardy and that I was --  
3 since it did appear that it was my duty, I'm more than willing  
4 to take the oath and to meet with the jury commissioners and  
5 to revise the pool and correct the problem, if that is  
6 necessary.

7 Q And in our discussions that you and I have had  
8 about your testimony, what is the time frame that you feel is  
9 reasonable for reconstituting the jury panel?

10 A Well, not -- since all the groundwork is done --  
11 and if it's done correctly, I don't know. If everything is  
12 done correctly, it wouldn't take very long at all, less than  
13 30 days.

14 Q Okay.

15 A If you were -- if there are problems, of course,  
16 you have to address them. And, you know, I can't see the  
17 future.

18 Q And your proposal is, is that you would appear  
19 before the probate judge, swear to your oath, begin your  
20 duties and meet with the jury commissioners and not with the  
21 judges of the superior court; is that a fair statement?

22 A Well, I don't know if I'd say it that way. I talk  
23 with the judges on a daily basis, not all of them but some of  
24 them. And I'm sure I might discuss the jury situation with  
25 them without any hesitation. But as far as the constitution



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1 of the jury, probably the jury commissioners, under the way I  
2 read the law, would --

3 Q It's you and the jury commissioners?

4 A -- would try to determine the best way to do that  
5 in accordance with the statutes.

6 MR. BRITT: Thank you, Mr. Lawler.

7 CROSS-EXAMINATION

8 BY MR. PORTER:

9 Q Mr. Lawler, when you were first elected clerk, were  
10 you approached by the court administrator regarding the  
11 allocation of jury duties?

12 A Yes.

13 Q And did Mr. O'Neill offer to you that he would  
14 continue to constitute and manage and handle the juries, as  
15 had been done for some time prior under the administration of  
16 Mr. Yates?

17 A Well, when I came in, it was the beginning of the  
18 year. And these plans are often filed toward the beginning of  
19 each year or toward the end of the last year. And since I had  
20 just been elected -- I think the way he put it, if my recall  
21 is pretty good -- is: Do you want the jury back?

22 And I said: Not necessarily.

23 And he said: Well, we have the jury plan. Do you  
24 want me to continue it?

25 And I said: Certainly.

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1 Q And at that time did you essentially feel  
2 comfortable in delegating the responsibility to the jury to  
3 the court administrator?

4 A Well, see, I didn't feel like I was delegating it.  
5 My understanding -- I was here, as you know, as the district  
6 attorney when the original statute was passed in the  
7 legislature that had the population guidelines. And they were  
8 designed in the legislature for Gwinnett County. So I had  
9 never -- I knew we had a statute that allowed the jury plan.  
10 I knew we fell within the statute. I had no idea that we were  
11 no longer in the population cap.

12 Q So in good faith you essentially continued a  
13 practice that you at that time believed to be correct?

14 A Well, yes. And plus, you know, I have an order  
15 that operates that way. And I do tend to follow court orders.  
16 So the order had been issued. And the way we were going to do  
17 jury plan, I had no objection to it. And to be honest, it's  
18 worked very well since 1988, which is the original order.

19 Q And your understanding was, when you allowed Mr.  
20 O'Neill to continue, you were operating that you were within  
21 compliance with the law?

22 A My feeling -- I had no idea that the population cap  
23 was below our population, yes.

24 MR. PORTER: Thank you. That's all the questions I  
25 have.

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REDIRECT EXAMINATION

BY MR. BRITT:

Q When you discussed this matter prior to the previous hearing in December with Judge Jackson and you related your fears and your thoughts on the matter, what did he say to you about remedying the situation?

A He said that he was going to discuss it with the judges and Homer Stark, our former chief judge, who's a senior judge, and that he'd get back to me.

Q And since that date, which I believe was in early December --

A I've had no contact with anybody from the -- any judge concerning what I should or should not do.

MR. BRITT: Thank you, Mr. Lawler.

MR. PORTER: I have no recross.

THE COURT: Okay. Do you want to go to another witness?

MR. BRITT: Yes.

THE WITNESS: Thank you.

THE COURT: Excuse him subject to recall?

MR. BRITT: We're through. He can be released. He has to go out of town.

THE WITNESS: I have to go out of town tomorrow. Would that be all right if I'm released?

MR. PORTER: Fine with the State.

# Profiles of General Demographic Characteristics 2000

Issued May 2001

*U.S. Census Bureau Population and Housing  
Georgia*



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State  
County  
Place  
Consolidated City  
Metropolitan Area - State Part  
American Indian Area - State Part  
Congressional District (106<sup>th</sup> Congress)  
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Table DP-1. Profile of General Demographic Characteristics: 2000

Geographic Area: Georgia

[For information on confidentiality protection, nonsampling error, and definitions, see text]

Subject	Number	Percent	Subject	Number	Percent
<b>Total population</b> .....*	8,186,453	100.0	<b>HISPANIC OR LATINO AND RACE</b>		
<b>SEX AND AGE</b>			Total population.....	8,186,453	100.0
Male.....	4,027,113	49.2	Hispanic or Latino (of any race).....	435,227	5.3
Female.....	4,159,340	50.8	Mexican.....	275,288	3.4
Under 5 years.....	585,150	7.3	Puerto Rican.....	35,532	0.4
5 to 9 years.....	515,584	7.5	Cuban.....	12,536	0.2
10 to 14 years.....	607,759	7.4	Other Hispanic or Latino.....	111,871	1.4
15 to 19 years.....	596,277	7.3	Not Hispanic or Latino.....	7,751,226	94.7
20 to 24 years.....	592,198	7.2	White alone.....	5,128,561	62.6
25 to 34 years.....	1,298,256	15.9	<b>RELATIONSHIP</b>		
35 to 44 years.....	1,353,508	16.5	Total population.....	8,186,453	100.0
45 to 54 years.....	1,079,992	13.2	In households.....	7,952,831	97.1
55 to 59 years.....	375,651	4.6	Householder.....	3,006,369	36.7
60 to 64 years.....	285,805	3.5	Spouse.....	1,548,800	18.9
65 to 74 years.....	435,695	5.3	Child.....	2,439,098	29.8
75 to 84 years.....	261,723	3.2	Own child under 18 years.....	1,899,303	23.2
85 years and over.....	87,857	1.1	Other relatives.....	522,651	6.4
Median age (years).....	33.4	(X)	Under 18 years.....	218,208	2.7
18 years and over.....	6,017,219	73.5	Nonrelatives.....	435,713	5.3
Male.....	2,915,524	35.6	Unmarried partner.....	145,743	1.8
Female.....	3,101,695	37.9	In group quarters.....	233,822	2.9
21 years and over.....	5,646,535	69.0	Institutionalized population.....	126,023	1.5
62 years and over.....	948,821	11.6	Noninstitutionalized population.....	107,789	1.3
65 years and over.....	785,275	9.6	<b>HOUSEHOLD BY TYPE</b>		
Male.....	311,231	3.8	Total households.....	3,006,369	100.0
Female.....	474,044	5.8	Family households (families).....	2,111,647	70.2
<b>RACE</b>			With own children under 18 years.....	1,051,302	35.0
One race.....	8,072,265	98.6	Married-couple family.....	1,548,800	51.5
White.....	5,327,281	65.1	With own children under 18 years.....	732,734	24.4
Black or African American.....	2,349,542	28.7	Female householder, no husband present.....	435,410	14.5
American Indian and Alaska Native.....	21,737	0.3	With own children under 18 years.....	258,008	8.6
Asian.....	173,170	2.1	Nonfamily households.....	894,722	29.8
Asian Indian.....	48,132	0.6	Householder living alone.....	710,523	23.6
Chinese.....	27,448	0.3	Householder 65 years and over.....	210,409	7.0
Filipino.....	11,036	0.1	Households with individuals under 18 years.....	1,174,114	39.1
Japanese.....	7,242	0.1	Households with individuals 65 years and over.....	563,830	18.8
Korean.....	28,745	0.4	Average household size.....	2.85	(X)
Vietnamese.....	29,018	0.4	Average family size.....	3.14	(X)
Other Asian <sup>1</sup> .....	23,553	0.3	<b>HOUSING OCCUPANCY</b>		
Native Hawaiian and Other Pacific Islander.....	4,246	0.1	Total housing units.....	3,281,737	100.0
Native Hawaiian.....	866	-	Occupied housing units.....	3,006,369	91.6
Guamanian or Chamorro.....	1,568	-	Vacant housing units.....	275,368	8.4
Samoan.....	819	-	For seasonal, recreational, or		
Other Pacific Islander <sup>2</sup> .....	995	-	occasional use.....	50,064	1.5
Some other race.....	196,288	2.4	Homeowner vacancy rate (percent).....	1.9	(X)
Two or more races.....	114,188	1.4	Rental vacancy rate (percent).....	8.2	(X)
<i>Race alone or in combination with one</i>			<b>HOUSING TENURE</b>		
<i>or more other races:</i> <sup>3</sup> .....			Occupied housing units.....	3,006,369	100.0
White.....	5,412,371	68.1	Owner-occupied housing units.....	2,029,154	67.5
Black or African American.....	2,393,425	29.2	Renter-occupied housing units.....	977,215	32.5
American Indian and Alaska Native.....	53,197	0.6	Average household size of owner-occupied units.....	2.71	(X)
Asian.....	199,812	2.4	Average household size of renter-occupied units.....	2.51	(X)
Native Hawaiian and Other Pacific Islander.....	9,689	0.1			
Some other race.....	241,298	2.9			

- Represents zero or rounds to zero. (X) Not applicable.

<sup>1</sup> Other Asian alone, or two or more Asian categories.<sup>2</sup> Other Pacific Islander alone, or two or more Native Hawaiian and Other Pacific Islander categories.<sup>3</sup> In combination with one or more of the other races listed. The six numbers may add to more than the total population and the six percentages may add to more than 100 percent because individuals may report more than one race.

Source: U.S. Census Bureau, Census 2000.

**Table DP-1. Profile of General Demographic Characteristics: 2000**  
**Geographic Area: Gwinnett County, Georgia**

(For information on confidentiality protection, nonsampling error, and definitions, see text)

Subject	Number	Percent	Subject	Number	Per.
<b>Total population</b> .....	<b>588,448</b>	<b>100.0</b>	<b>HISPANIC OR LATINO AND RACE</b>		
<b>SEX AND AGE</b>			<b>Total population</b> .....	<b>588,448</b>	<b>100.0</b>
Male.....	296,749	50.4	Hispanic or Latino (of any race).....	64,137	10.9
Female.....	291,699	49.6	Mexican.....	38,018	6.1
Under 5 years.....	47,075	8.0	Puerto Rican.....	4,173	0.7
5 to 9 years.....	47,218	8.0	Cuban.....	2,098	0.4
10 to 14 years.....	45,661	7.8	Other Hispanic or Latino.....	21,850	3.7
15 to 19 years.....	40,435	6.9	Not Hispanic or Latino.....	524,311	89.1
20 to 24 years.....	36,610	6.2	White alone.....	394,164	67.0
25 to 34 years.....	104,688	17.8	<b>RELATIONSHIP</b>		
35 to 44 years.....	115,719	19.7	<b>Total population</b> .....	<b>588,448</b>	<b>100.0</b>
45 to 54 years.....	81,237	13.8	In households.....	582,063	98.9
55 to 59 years.....	23,591	4.0	Householder.....	202,317	34.4
60 to 64 years.....	14,617	2.5	Spouse.....	123,729	21.0
65 to 74 years.....	18,947	3.2	Child.....	197,819	31.9
75 to 84 years.....	9,804	1.7	Own child under 18 years.....	153,571	26.1
85 years and over.....	2,848	0.5	Other relatives.....	35,952	6.1
Median age (years).....	32.5	(X)	Under 18 years.....	9,477	1.6
18 years and over.....	422,465	71.8	Nonrelatives.....	32,446	5.5
Male.....	211,284	35.9	Unmarried partner.....	8,978	1.5
Female.....	211,171	35.9	In group quarters.....	6,385	1.1
21 years and over.....	401,140	68.2	Institutionalized population.....	3,913	0.7
62 years and over.....	39,575	6.7	Noninstitutionalized population.....	2,472	0.4
65 years and over.....	31,589	5.4	<b>HOUSEHOLD BY TYPE</b>		
Male.....	12,759	2.2	<b>Total households</b> .....	<b>202,317</b>	<b>100.0</b>
Female.....	18,840	3.2	Family households (families).....	152,296	75.3
<b>RACE</b>			With own children under 18 years.....	85,498	42.3
One race.....	575,775	97.8	Married-couple family.....	123,729	61.2
White.....	427,883	72.7	With own children under 18 years.....	89,084	34.1
Black or African American.....	78,224	13.3	Female householder, no husband present.....	20,319	10.0
American Indian and Alaska Native.....	1,838	0.3	With own children under 18 years.....	12,681	6.3
Asian.....	42,360	7.2	Nonfamily households.....	50,021	24.7
Asian Indian.....	11,284	1.9	Householder living alone.....	37,230	18.4
Chinese.....	6,380	1.1	Householder 65 years and over.....	6,171	3.1
Filipino.....	1,186	0.2	Households with individuals under 18 years.....	91,051	45.0
Japanese.....	1,048	0.2	Households with individuals 65 years and over.....	22,654	11.2
Korean.....	9,298	1.6	Average household size.....	2.88	(X)
Vietnamese.....	7,709	1.3	Average family size.....	3.28	(X)
Other Asian <sup>1</sup> .....	5,455	0.9	<b>HOUSING OCCUPANCY</b>		
Native Hawaiian and Other Pacific Islander.....	263	-	<b>Total housing units</b> .....	<b>209,682</b>	<b>100.0</b>
Native Hawaiian.....	66	-	Occupied housing units.....	202,317	96.5
Guamanian or Chamorro.....	73	-	Vacant housing units.....	7,365	3.5
Samoan.....	31	-	For seasonal, recreational, or		
Other Pacific Islander <sup>2</sup> .....	93	-	occasional use.....	354	0.2
Some other race.....	25,407	4.3	Homeowner vacancy rate (percent).....	1.2	(X)
Two or more races.....	12,673	2.2	Rental vacancy rate (percent).....	5.7	(X)
<b>Race alone or in combination with one</b>			<b>HOUSING TENURE</b>		
<b>or more other races:<sup>3</sup></b>			<b>Occupied housing units</b> .....	<b>202,317</b>	<b>100.0</b>
White.....	437,452	74.3	Owner-occupied housing units.....	146,543	72.4
Black or African American.....	81,804	13.9	Renter-occupied housing units.....	55,774	27.6
American Indian and Alaska Native.....	3,939	0.7	Average household size of owner-occupied units.....	2.98	(X)
Asian.....	45,993	7.8	Average household size of renter-occupied units.....	2.60	(X)
Native Hawaiian and Other Pacific Islander.....	742	0.1			
Some other race.....	31,945	5.4			

- Represents zero or rounds to zero. (X) Not applicable.

<sup>1</sup> Other Asian alone, or two or more Asian categories.

<sup>2</sup> Other Pacific Islander alone, or two or more Native Hawaiian and Other Pacific Islander categories.

<sup>3</sup> In combination with one or more of the other races listed. The six numbers may add to more than the total population and the six percentages may add to more than 100 percent because individuals may report more than one race.

Source: U.S. Census Bureau, Census 2000.

ISSUES CONCERNING A CROSS-SECTION OF THE COMMUNITY  
IN GWINNETT COUNTY'S JURY POOL BASED ON THE 2000 CENSUS

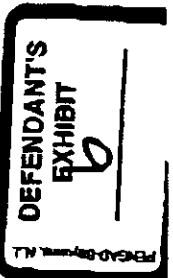
*The Numbers*

- 74.3% White
- 13.9% Black or African American
- 7.8% Asian
- 0.7% American Indian and Alaska Native
- 0.1% Native Hawaiian and other Pacific Islander
- 5.4% Other race
- 10.9% Hispanic (of any race)

\*These numbers have been forwarded to the County by the U.S. Department of Commerce and the U.S. Census Bureau. Congress has not "certified" these numbers\*

*The Law*

- A defendant has a Sixth Amendment right to a jury made up of a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522 (1975).
- "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." Duren v. Missouri, 439 U.S. 357, 364 (1979). The U.S. Supreme Court has not further defined what is a "distinctive group" under the Duren test, but several courts, both federal and state, have addressed this precise issue.
- Regarding whether Hispanics are a "distinctive group" for Sixth Amendment cross-section requirements, many jurisdictions have specifically held that they are such a group. See, e.g., Castaneda v. Partida, 430 U.S. 482, 495 (1977) (Mexican-Americans); U.S. v. Lara, 181 F.3d 183, 191 (1st Cir. 1999); U.S. v. Rioux, 97 F.3d 648, 654 (2d Cir. 1996); U.S. v. Cecil, 836 F.2d 1431 (7) (4th Cir. 1988); U.S. v. Garcia, 991 F.2d 489, 491 (8th Cir. 1993); U.S. v. Nelson, 137 F.3d 1094 (2) (9th Cir. 1998); U.S. v. Chanthadara, 230 F.3d 1237, 1256 (10th Cir. 2000); U.S. v. Coronell-Leon, 973 F. Supp. 1094, 1099 (Defendant. Neb. 1997); U.S. v. Haworth, 948 F. Supp. 981, 985 (D.N.M. 1996); U.S. v. Johnson, 21 F. Supp.2d 329, 334 (S.D.N.Y. 1998); State v. Atwood, 832 Plaintiff.2d 593, 638-39 (Ariz. 1992); People v. Avala, 1 Plaintiff.3d 3 (19) (Cal. 2000); State v. Gibbs, 758 A.2d 327, 335 (Conn. 2000); State v. Paz, 798 Plaintiff.2d 1 (4) (Idaho 1990), *overruled on other grounds* State v. Card, 825 Plaintiff.2d 1081 (1991); People v. Broadnax, 532 N.E.2d 936, 942 (Ill. 1988); Commonwealth v. Prater, 725 N.E.2d 233, 239 (Mass. 2000); State v. Robles, 535 N.W.2d 729, 732 (N.D. 1995); Aldrich v. State, 928 S.W.2d 558, 560 (Tex. 1996); State v. Young, 853 Plaintiff.2d 327(9) (Utah 1993); State v. Guerra-Reyna, 549 N.W.2d 779, 781 (Wis. 1996) (Mexican-Americans). *But see* U.S. v. Rodriguez, 588 F.2d 1003, 1007 (5th Cir. 1979) (Pre-Duren case finding that Hispanics were not a cognizable group under Sixth Amendment); U.S. v. Duran de Amesquita, 582 F. Supp. 1326, 1328 (S.D.FL 1984) (making same finding); U.S. v. Musto, 540 F. Supp. 346 (19) (D.C.N.J. 1982) (doubting whether Hispanics are a cognizable group under Sixth Amendment).





- Regarding the second prong of the test, an absolute disparity between the percentage of a group in the population and its percentage in the jury pool of less than 5% is almost always constitutional; an absolute disparity between 5% and 10% is usually constitutional; and an absolute disparity of over 10% is probably unconstitutional. See Morrow v. State, 272 Ga. 691 (2000).
- A Sixth Amendment challenge was brought in Georgia and tested by the Supreme Court in Morrow, *supra*. There, Justice Carley did not specifically hold that Hispanics were a cognizable group but instead focused on the other two prongs of the Duren test, arguably recognizing and/or assuming that Hispanics are a group for Sixth Amendment purposes.
- O.C.G.A. § 15-12-40 (a) (1) states the following: "At least biennially, unless otherwise directed by the chief judge of the superior Court, the board of jury commissioners shall compile, maintain, and revise a trial jury list of upright and intelligent citizens of the county to serve as trial jurors and a grand jury list of the most experienced, intelligent, and upright citizens of the county to serve as grand jurors. In composing the trial jury list, the board of jury commissioners shall select a fairly representative cross section of the intelligent and upright citizens of the county. In composing the grand jury list, the board of jury commissioners shall select a fairly representative cross section of the most experienced, intelligent, and upright citizens of the county." "A violation of § 15-12-40 is proven by showing a wide absolute disparity between the percentage of the group in the population and its percentage in the jury pool." Morrow, *supra* at 693.
- "The Unified Appeal Procedure states that there should be no imbalances for cognizable groups greater than 5%, UAP § E, but [the Supreme] Court has stated that the 5% rule is a prophylactic rule designed to ensure to the extent possible that disparities would be kept well below the constitutional minimum." Morrow, *supra* at 693.
- In Georgia, "[t]here is no constitutional guarantee that grand or petit juries, impaneled in a particular case, will constitute a representative cross-section of the entire community. The proper inquiry concerns the procedures for compiling the jury lists and not the actual composition of the grand or traverse jury in a particular case. The Constitution requires only that the State not deliberately and systematically exclude identifiable and distinct groups from jury lists; hence, in order to prevail on a constitutional challenge to the composition of the grand and petit juries in his case, a criminal defendant must establish *prima facie* that a distinct and identifiable group in the community is substantially under-represented on the jury venire." Torres v. State, 272 Ga. 389 (2000).
- Under O.C.G.A. § 15-12-40.1, no person shall be qualified to serve as a juror unless that person is a citizen of the United States.

#### ***The Time-Line***

- Under § 15-12-40 (a) (1), the jury commissioners are to revise the trial and grand jury list at least biennially. Our last revision was September 28, 1999.
- § 15-12-40 (a) (1) gives specific instructions of how to revise the trial and grand jury lists after July 1, 2000 in that it lists sources that the jury commissions must use in the revision.

AN ANALYSIS OF GWINNETT COUNTY'S JURY POOL  
BASED ON THE 2000 CENSUS

*First Issue: Are Hispanics "Cognizable" for Sixth Amendment Jury Purposes?*

- @ Willis v. Zant, 720 F.2d 1212, 1216 (11th Cir. 1983), *cert. denied*, 467 U.S. 1256, 104 S. Ct. 3548, 82 L. Ed. 2d 851 (1984) sets forth a test for determining if a group is distinctive enough to be cognizable for cross-section purposes:
- (1) that the group is defined and limited by some factor (i.e., that the group has a definite composition such as by race or sex);
  - (2) that a common thread or basic similarity in attitude, ideas, or experience runs through the group;
  - (3) that there is a community of interest among members of the group such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process.
- @ Georgia appellate courts have applied the Willis test to college students and age groups and found that these are not cognizable. Henry v. State, 265 Ga. 732, 734-35 (3) (1995) (college students); Potts v. State, 259 Ga. 812, 813 (1) (1990) (18-24 age group); Hicks v. State, 256 Ga. 715, 718 (7) (1987) (age groups generally); Swanson v. State, 248 Ga. App. 551, 555 (3) (2001) (18-24 age group).
- @ Specifically regarding Hispanics, the Florida Supreme Court has applied the Willis test and found that they are cognizable regarding a Batson challenge. State v. Alen, 616 So.2d 452 (Fl. 1993). *But see* U.S. v. Rodriguez, 588 F.2d 1003, 1007 (5th Cir. 1979) (Pre-Duren case finding that Hispanics were not a cognizable group under Sixth Amendment); U.S. v. Duran de Amesquita, 582 F. Supp. 1326, 1328 (S.D.Fl. 1984) (making same finding); U.S. v. Musto, 540 F. Supp. 346 (19) (D.C.N.J. 1982) (doubting whether Hispanics are a cognizable group under Sixth Amendment).
- @ The Seventh Circuit has applied the Willis test to Native Americans on reservations and found that they are not cognizable. U.S. v. Raskiewicz, 169 F.3d 459 (7th Cir. 1999). This case is informative about how to apply the test, and it contains good overall analysis of the subject.
- @ The cases relied on by the District Attorney that Hispanics are not cognizable: Wellons v. State, 266 Ga. 77, 90-91 (29) (1995); DeYoung v.



State, 268 Ga. 780, 790-91 (14) (1997). The District Attorney takes the position that the law has held that Mexican-Americans constitute a cognizable class, not the broader group of Hispanics.

*Second Issue: How do our numbers stack up against the law?*

- @ Applying the Unified Appeal traverse jury certificate formulas, if the jury pool is left as it stands, there is a 13.73% disparity; if the jury pool is reduced to 28,000, there is a 9.93% disparity.
- @ Georgia law states that an absolute disparity between the percentage of a group in the population and its percentage in the jury pool of less than 5% is almost always constitutional; an absolute disparity between 5% and 10% is usually constitutional; and an absolute disparity of over 10% is probably unconstitutional. See Morrow v. State, 272 Ga. 691 (2000).
- @ In Wells v. State, 243 Ga. App. 629, 630 (2000), the Court of Appeals found an absolute disparity of 9.9% satisfied constitutional requirements and then went on to address the third prong.
- @ In Cochran v. State, 256 Ga. 113, 115-16 (8) (1986), the Georgia Supreme Court held that an absolute disparity of 7.1% regarding women on a jury panel was not a significant enough disparity to require reversal of a conviction. In West v. State, 252 Ga. 156, 157 (1) (1984), the Georgia Supreme Court found a constitutional violation where there was a 17% absolute disparity for women in a jury pool. In Devier v. State, 250 Ga. 652 (1) (1983), the Georgia Supreme Court found a constitutional violation where there was a 36% absolute disparity for women in a jury pool. In these last two cases, once a disparity above ten percent was found, the third prong of the Duren test, systematic exclusion, was not addressed.
- @ "In order to show systematic exclusion, the defendant must demonstrate sufficiently to establish a prima facie case that (1) the sources from which the jury list was drawn are tainted in that they provide the opportunity for discrimination, and (2) that use of these sources resulted in a substantial disparity between the percentages of the separate class on the jury list and in the population as a whole." Orkin v. State, 236 Ga. 176, 191 (4) (1976) (citing Whitus v. Georgia, 385 U.S. 545, 550 (87 S. Ct. 643, 17 L. Ed. 2d 599) (1967); Foster v. Sparks, 506 F.2d 805(4) (5th Cir. 1975); Pass v. Caldwell, 231 Ga. 192 (1973)). Random selection negates unsubstantiated allegations of a deliberate and systematic exclusion of an identifiable and distinct group. Wells, supra, 243 Ga. at 630, n. 3.